Nos. 229

In the Supreme Court of the United States

OCTOBER TERM, 1951

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, PETITIONER

v.

UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION

WARREN H. PILLSBURY, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, PETITIONER

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v.

MATSON TERMINALS, INC., A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION

ROBERT J. CYR, DEPUTY COMMISSIONER FOR THE THIRTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, PETITIONER

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED ENGINEERING COMPANY, A CORPORATION, AND FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Warren H. Pillsbury and Albert J. Cyr, Deputy Commis-

sioners under the Longshoremen's and Harbor Workers' Compensation Act for the Thirteenth Compensation District, prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cases on March 14, 1951.[1]

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California, Southern Division (JR. 15; CR. 15; SR. 14; MR. 15) is reported at 92 F. Supp. 898.[2] The opinion of the United States Court of Appeals for the Ninth Circuit (JR. 44; CR. 70; SR. 42; MR. 56) is reported at 187 F. 2d 987.

JURISDICTION

The judgments of the Court of Appeals were entered on March 14, 1951 (JR. 48; CR. 74; SR. 46; MR. 60). By order of Mr. Justice Black dated June 7, 1951, the time for applying for certiorari was extended to and including August 11, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

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[1] The Solicitor General appears for petitioners pursuant to the requirements of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*), as amended by the Act of May 4, 1928, 45 Stat. 490, 33 U.S.C. 921a.

[2] Because of the existence of a question of law common to each of the four cases, they were consolidated both for trial and on appeal, and all four cases were dealt with in single opinions both in the District Court and the Court of Appeals. For convenience, the records in Nos. 12644, 12645, 12646, and 12647 below are hereinafter respectively referred to as JR, CR, SR, and MR—the letters preceding the letter "R" being the first initial of the surnames of each of the claimants.

QUESTION PRESENTED

Whether the one-year period of limitation upon the filing of claims for compensation for disability under the Longshoremen's and Harbor Workers' Compensation Act, prescribed by Section 13(a) of that Act, begins at the time of the accident, or when the injury resulting from the accident becomes compensable.

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. 901 *et seq.*, are set out in the Appendix, *infra*, pp. 22-25. Section 13(a) of that Act, 33 U.S.C. 913, which is most immediately involved, provides as follows:

> The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

STATEMENT

In these four consolidated cases, the plaintiff employers and their respective insurance carriers (respondents herein) seek to set aside and enjoin

the enforcement of Compensation Orders and Awards made by the Deputy Commissioners (petitioners herein) pursuant to the Longshoremen's and Harbor Workers' Compensation Act, *supra*. In each case, respondent's sole contention is that the Deputy Commissioner lacked jurisdiction to make the award because the claim for compensation was not filed within a year after the claimant was accidentally injured. Although this basic question is common to each of the cases, the underlying facts and the Deputy Commissioners' findings differ; accordingly, they are separately stated.

Johnson. Claimant Howard Johnson on May 12, 1947, struck his head and neck on a cross-beam of a vessel while employed as a leaderman welder (JR. 6). Medical treatment was furnished from the date of the accident but no compensation payments were made. (JR. 4, 6, 7). Although suffering extensive strain of the neck muscles, Johnson lost no time from work as a result of the accident—his employer continuing him without reduction in wages as a welder at lighter work in its machine shop until it disposed of its business on May 15, 1948 (JR. 6, 28-29). Subsequently, on June 15, 1948, Johnson was discharged by the new owner because of his physical inability to do welding aboard ship (JR. 29, 31). Since that time, Johnson has been employed only intermittently at jobs requiring only the less strenuous types of welding operations (JR. 6, 29, 30). On January 17, 1949, twenty-one months after the date of the accident,

Johnson filed his claim for compensation. At the time of the hearing, Johnson had just obtained new employment as a shop welder at a slightly lower rate of pay (JR. 30). The Deputy Commissioner found that no cause of action accrued in Johnson's favor under the Act until the completion of one week's disability from labor after June 15, 1948,[3] and that the claim for compensation was, therefore, not barred by limitations (JR. 6).

Curnutt. Claimant Frank S. Curnutt on February 18, 1947, while employed as a sheetmetal worker aboard a vessel, wrenched his back in lifting a heavy object from the deck to a table (CR. 6, 33). Medical treatment was furnished him, but no compensation payments were made (CR. 4, 6, 7). He was disabled from work for six days (CR. 6). When he returned to his job, he was relieved of all heavy work on doctor's orders (CR. 34), and performed lighter duties at his former wage rate until his employment was terminated on January 13, 1948 (CR. 6, 34, 44). After resting for two weeks to improve his condition, he obtained work with another company (CR. 35, 50). In June 1948, he took a vacation for five weeks as a therapeutic measure suggested by his physicians (CR. 7, 35, 51). In July, he returned to work with still another company, but soon was forced to give up this job, and subsequent ones, because the work

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[3] Section 6 of the Act provides that no compensation shall be allowed for the first seven days of the disability. 33 U.S.C. 906.

was too strenuous (CR. 35, 36, 45). On January 17, 1949, twenty-three months after the date of the accident, Curnutt filed his claim for compensation (CR. 6). At the time of the hearing, Curnutt had just obtained new employment as a sheetmetal worker (CR. 46). The Deputy Commissioner found that Curnutt had not lost wages in excess of seven days as a result of his injury until February 5, 1948, and that the claim for compensation was, therefore, not barred by limitations (CR. 6).

Shallat. Claimant Louis Shallat on November 21, 1947, caught his left hand between a sling and a bight while working as a stevedore aboard a vessel (SR. 6). He sustained a contusion of the left hand and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger (SR. 6). Shallat apparently lost no time because of the accident and continued at work. No compensation payments were made (SR. 4, 6). According to his testimony, his hand pained him considerably and he applied self-treatment (SR. 29). The pain progressively became more severe, and he filed a claim for compensation on May 23, 1949, eighteen months after the accident (SR. 6, 28). Upon these facts, the Deputy Commissioner found that Shallat had not sustained a disability for which an award could be made "until the condition of his left second finger reached a permanent stage and became a permanent disability" (SR. 6), which was "within one year prior to the filing of the claim" (SR. 6). He held, there-

fore, that the claim was not barred by limitations (SR. 6).

Manos. Claimant Chris Manos on December 22, 1947, while employed as a welder aboard a vessel, was struck on the top of his head by an iron saddle falling from above and sustained a strain of the musculature in the cervical region (MR. 6, 26). He was instructed not to weld by his physician, and, consequently, was given lighter work by his employer at the same rate of pay (MR. 6, 27-28). Medical treatment was furnished him, but no compensation payments were made (MR. 4, 7). A few months later, his job was terminated as a result of a general reduction in employment at the shipyard (MR. 28). After a week, he obtained another job as a shop welder at a slightly higher wage rate (MR. 29). This job ended in January, 1949, because of a general lay off (MR. 29, 30). His neck troubled him continually since the accident, and his injury progressively became worse despite medical treatment (MR. 27, 30, 31, 35, 36, 37). On August 17, 1949, twenty months after the date of the accident, he filed his claim for compensation (MR. 7). At the time of the hearing, Manos was still unemployed, but was planning to engage in sales work (MR. 30). Upon these facts, the Deputy Commissioner found that he was forced to discontinue working as a welder and seek lighter employment because of the condition of his neck on or about January 31, 1949; that he first became disabled and suffered wage loss beginning with February 1, 1949,

within one year prior to the filing of the claim; and that the claim was not, therefore, barred by limitations (MR. 7).

In the proceedings before the district court, the Deputy Commissioners justified their awards as supported by the evidence and in accordance with the law, and moved to dismiss the complaints on the ground that Section 13(a) of the Act starts the one-year period of limitation running, not from the date of the injury, but from the date on which the injury becomes compensable (JR. 12, 18; CR. 12, 18; SR. 11, 17; MR. 12, 18). Without deciding this question, the court held that the Deputy Commissioners had erred in finding that the injuries were not compensable prior to a loss of wages. The court pointed out that compensation is payable under the Act for disability, which is defined in Section 2(10) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment" (33 U.S.C. 902(10)), and found, after making its own appraisal of the evidence, that the claimants' earning capacity had been impaired from the dates of injury so as to have entitled them to compensation.[4] It held that the claims for com-

[4] The Deputy Commissioners had made no express findings in respect of the claimants' earning capacity other than the findings as to when loss of wages occurred. They found, however, that no compensation had been paid, which would seem to imply that, in their view of the several cases, the claimants had earned the full amount of the wages paid to them. Had the Deputy Commissioners adopted the view of the case later taken by the District Court, the continued

pensation, not having been made within one year of the injuries, had not been timely filed and accordingly set aside and vacated the awards (JR. 15-21; CR. 15-21; SR. 14-20; MR. 15-21).

On appeal, the court below affirmed but rested its decision upon a different ground. On the basis of its prior decision in *Kobilkin* v. *Pillsbury*, 103 F. 2d 667, affirmed by an equally divided Court, 309 U.S. 619, 695, it held that the period of limitation begins to run from the date of the accident, and not from the date of disability or compensable injury (JR. 44-48; CR. 70-74; SR. 42-46; MR. 56-60).

REASONS FOR GRANTING THE WRIT

In *Kobilkin* v. *Pillsbury*, 103 F. 2d 667, the court below held, in apparent conflict with the earlier decision of the Court of Appeals for the Third Circuit in *Di Giorgio Fruit Corp.* v. *Norton*, 93 F. 2d 119, certorari denied, 302 U.S. 767, that the period of limitation prescribed by Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act, *supra*, begins at the time of the accident. Subsequent to this Court's grant of certiorari (308 U.S. 530), and prior to the date of argument in the *Kobilkin* case, the Court of Appeals for the District of Columbia Circuit widened the area of conflict by holding, in accord with the Court of Ap-

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payment of full wages might have been regarded as constituting in part a payment of compensation without an award, thereby bringing the cases within the exception extending the one-year limitation where voluntary payments are made. See p. 19, *infra*.

peals for the Third Circuit, that the period of limitation does not begin until the injury becomes compensable. *Potomac Electric Power Co.* v. *Cardillo,* 107 F. 2d 962. The conflict of decisions among the circuits thus presented was left unresolved by this Court's later affirmance, without opinion and by an equally divided Court, of the *Kobilkin* decision. 309 U.S. 619, rehearing denied, 309 U.S. 695. The Court of Appeals for the District of Columbia Circuit has since reaffirmed its prior interpretation of Section 13(a), *Great American Indemnity Co.* v. *Britton,* 179 F. 2d 60, and, as a result of the decision below in the instant case, the conflict remains unresolved. Since the interpretation of the period of limitation prescribed under the Longshoremen's and Harbor Workers' Compensation Act and related Acts is a question of substantial importance in the administration of these statutes, we again respectfully ask this Court for an authoritative ruling.[5]

1. Construed as a whole, the language and structure of the Act compel rejection of the interpretation given Section 13(a) by the court below.

(a) In holding that the period of limitations begins from the time of accident instead of from the time the injury becomes compensable, the court below held, in effect, that it begins to run before the

[5] Because of the conflict of decisions and the substantial importance of the question presented, the Solicitor General, on behalf of the respondent Pillsbury, joined the petitioner in the application for a writ of certiorari in the *Kobilkin* case.

cause of action accrues. The Act does not give an employee any right to compensation if he is merely the victim of an accident; nor is mere pain and suffering compensable. Nor does the Act give him any right to compensation (other than the medical services and supplies provided for in Section 7 (33 U.S.C. 907))[6] even if he sustains an injury. Under Section 3(a) (33 U.S.C. 903(a)), compensation is payable only "in respect of disability or death"—disability being defined in Section 2(10) (33 U.S.C. 902(10)) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Compensation for disability, furthermore, is payable only if the disability lasts more than seven days. Section 6 (33 U.S.C. 906) provides that "no compensation shall be allowed for the first seven days of the disability," and Section 19(a) (33 U.S.C. 919(a)) does not permit the filing of a claim for compensation until "any time after the first seven days of disability following any injury."

The statutory scheme, accordingly, is as follows: The employee (or his representative) can recover compensation only if the employee is killed, or rendered temporarily or permanently incapable of earning his customary wages; the death or disability must be the result of an injury. The occurrence of an accident (a term not used in the statute) gives no right to compensation, nor does the sus-

[6] Such medical benefits are not "compensation" under the Act. *Marshall* v. *Pletz*, 317 U.S. 383.

taining of an injury; disability or death must result before the employee (or his representative) can claim compensation.

Since an employee can not file a claim until he has been disabled (for more than seven days), it would seem to follow as a matter of course that the period of limitation prescribed in Section 13(a) does not start until the employee is "disabled." In other words, "injury" in Section 13(a) should be construed, as was done in the *Di Giorgio* and *Potomac Electric Power Co.* cases, *supra*, to mean "compensable injury." The contrary reading, adopted by the court below, would cause the period of limitation to run before the employee becomes entitled to file a claim at all. Construing the word "injury" to mean "accident" would, in the case of a disability delayed for more than a year after the accident, compel the employee to seek compensation before he could claim it, and bar his claim when he becomes entitled to it. But "an intent to bar compensation claims before they arise cannot fairly be imputed to Congress." *Potomac Electric Power Co.* v. *Cardillo, supra*, at 964. "It cannot be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." *Borer* v. *Chapman*, 119 U.S. 587, 602; cf. *Urie* v. *Thompson*, 337 U.S. 163, 170. So to read the statute is, we submit, to disregard the oft-repeated injunction that the Longshoremen's Act should be

liberally construed to avoid incongruous or harsh results. See *Baltimore & Phila. Steamboat Co.* v. *Norton,* 284 U.S. 408, 414; *Harbor Marine Contracting Co.* v. *Lowe,* 152 F. 2d 845, 847 (C.A. 2), certiorari denied, 328 U.S. 837; *Travelers Ins. Co.* v. *Branham,* 136 F: 2d 873, 875 (C.A. 4).

(b) To construe "injury" in Section 13(a) as meaning "compensable injury" not only brings that section into harmony with the other provisions of the Act but avoids incongruity within that section as well. Section 2(2) (33 U.S.C. 902(2)) defines "injury" as (1) "accidental injury," or (2) "death" which arises "out of and in the course of employment," and (3) "occupational disease or infection * * * as naturally or unavoidably results from such accidental injury." Section 13(a) provides that a claim for compensation must be filed "within one year after the injury" and "within one year after the death." Accordingly, to read "injury" in Section 13(a) as meaning "accident" is to ignore the fact that the definition of "injury" includes "death" and that the period of limitation upon a claim for death expressly does not begin at the time of the accident, but only when the accident has culminated in death. Cf. *Lawson* v. *Suwannee S. S. Co.,* 336 U.S. 198. Obviously, death is not always or even generally concurrent with the accident; it frequently occurs at some later time. Further, as noted above, "injury" includes within its definition occupational disease or infec-

tion resulting from accidental injury. Implicitly, therefore, where occupational disease or infection results from accidental injury, "injury" can not be defined as "accident" without barring claims for occupational disease which develops more than a year after the accident. Consequently, it would seem to follow that, where an accident results in "accidental injury" the "injury" within the statutory meaning does not occur at the time of the accident, but, as in the case of death or occupational disease, only when the resulting disability arises. This conclusion is substantiated by the textual definition of "injury" in Section 2(2) as "accidental injury." "Accidental injury" can mean only one thing—injury resulting from an accident. It is clear, therefore, that the Act intended to distinguish between "accident" and "injury" and not to equate them. To read "injury" otherwise where trauma are concerned would be to accord an inconsistent treatment within Section 13(a) to the three statutory kinds of "injury"—trauma, death, and occupational disease. On the other hand, to read "injury" as "compensable injury" is entirely in accord with the Act's humanitarian purpose and spirit.[7]

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[7] The opinion below suggests that, had Congress intended the period of limitation to begin when an employee is disabled and, therefore, entitled to compensation, Congress would have employed the phrase "compensable injury" or "disability" rather than "injury" in Section 13(a) of the Act. It can equally be argued that, had Congress intended the period to begin at the time of the "accident," it would have employed that word rather than "injury." We think it not without

2. In *Kobilkin* v. *Pillsbury*, 103 F. 2d 667, *supra*, the court below relied in great part upon its reading of local law decisions, stating that "decisions arising under statutory provisions analogous to those of the federal act generally hold that the date of injury, and not the subsequent date when incapacity develops, is the one from which the time lim-

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significance that Congress deliberately employed the word "injury." As originally introduced, the bill which became the Longshoremen's Act (S. 3170, 69th Cong., 1st Sess.; 67 Cong. Rec. 4119) provided, in Section 14 thereof, that "the right to claim compensation shall be barred unless within two years after the accident * * * a claim for compensation shall be filed with the deputy commissioner * * *." Comparison of this provision of the bill with the language ultimately embodied in Section 13(a) of the Act reveals that Congress reduced the statutory period from two years to one year, and also substituted the word "injury" for the word "accident." This change is illuminating in view of the fact that the Longshoremen's Act is modeled upon the New York Workmen's Compensation Law (H. Rep. 1422, 70th Cong., 1st Sess.; *Wheeling Corrugating Co.* v. *McManigal*, 41 F. 2d 593, 595 (C.A. 4); *Kropp* v. *Parker*, 8 F. Supp. 290, 293 (D. Md.)), which as enacted in 1914 used the word "injury" in its limitation section but was amended in 1918 to substitute the word "accident" for "injury." That the adoption of the word "injury" instead of the word "accident" in the Longshoremen's Act was purposive is evidenced by the treatment the state courts have accorded amendments to local compensation laws which substituted "accident" for "injury." See *Landauer* v. *State Industrial Acc. Commission*, 175 Ore. 418, 154 P. 2d 189, and cases there collected. In this connection, it should be observed that the word "injury" might possibly be construed as "accident" in other sections of the Act. Cf. *Bethlehem Steel Co.* v. *Parker*, 163 F. 2d 334 (C.A. 4). But there is no need to decide those questions in the instant case; the word "injury," wherever it occurs in the Act, should be construed in the light of the context, structure, and purposes of the Act, and its meaning in different places need not be the same if the context, structure and purposes indicate otherwise. Cf. *Lawson* v. *Suwannee S. S. Co.*, 336 U.S. 198; *United States* v. *Champlin Refining Co.*, 341 U.S. 290; compare *Hustus' Case*, 123 Me. 428, 123 Atl. 514, with *McKenna's Case*, 117 Me. 179, 103 Atl. 69.

itation must be reckoned." (103 F. 2d at 669-670). To the extent that the disposition of the instant case by the court below upon the authority of the *Kobilkin* case reaffirms this ground for decision, it perpetuates a fundamental error which lends no support to the decision below.

Cases in the state courts construing state compensation acts are, of course, not controlling in interpreting the Longshoremen's Act. The limitation provisions of the various state acts differ extensively, some use the word "injury" as does the Longshoremen's Act, some use "accident," some have special governing definitions, and some have entirely different provisions. But where state statutes employ language substantially similar to that of the Longshoremen's Act, the clear weight of opinion, as the Courts of Appeals for the Third and District of Columbia Circuits pointed out in the *Di Giorgio* and *Potomac Electric Power Co.* cases, *supra,* is that "injury" should be construed to mean "compensable injury." See *Donaldson* v. *Calvert McBride Printing Co.,* 232 S.W. 2d 651 (Ark.); *Marsh* v. *Industrial Accident Comm'n,* 217 Cal. 338, 18 P. 2d 933; *Esposito* v. *Marlin-Rockwell Corp.,* 96 Conn. 414, 114 Atl. 92; *Burke* v. *Industrial Accident Comm'n,* 368 Ill. 554, 15 N.E. 2d 305; *Farmers Mutual Liability Co.* v. *Chaplin,* 114 Ind. App. 372, 51 N.E. 2d 378; *Guderian* v. *Sterling Sugar & Ry. Co.,* 151 La. 59, 91 So. 546; *Hustus' Case,* 123 Me. 428, 123 Atl. 514; *Clauson* v.

Minnesota Steel Co., 186 Minn. 80, 242 N.W. 397; *Wheeler* v. *Missouri Pac. R. Co.*, 328 Mo. 888, 42 S.W. 2d 579; *Anderson* v. *Contract Trucking Co.*, 48 N.M. 158, 146 P. 2d 873; *Swift & Co.* v. *State Industrial Comm'n*, 161 Okla. 132, 17 P. 2d 435; *Acme Body Works* v. *Koepsel*, 204 Wisc. 493, 234 N.W. 756, 236 N.W. 378; *Baldwin* v. *Scullion*, 50 Wyo. 508, 62 P. 2d 531; see also Br. for Resp. Pillsbury, in *Kobitkin* v. *Pillsbury*, No. 204, Oct. Term 1939, pp. 32-33; Appendix C, pp. 54-62.

3. The district court held that an employee is disabled within the meaning of the Act, and thus entitled to compensation, when he has become incapable of earning his customary wages rather than when the employee has suffered an actual loss of wages. The district court then found that the claimants' earning capacity had been impaired from the dates of injury so as to have entitled them to compensation, and that full wages were paid them not because they had earned them, but because of "exceptional consideration from a sympathetic employer" (JR. 19; CR. 19; SR. 18; MR. 19). If the court's interpretation of the Act is correct (see *Twin Harbor Stevedoring & Tug Co.* v. *Marshall*, 103 F. 2d 513 (C.A. 9)), it fell into reversible error in several respects. First, it should have remanded the several cases to the Deputy Commissioners to make findings as to when the claimants became incapable of earning their customary wages, rather than reappraising the evi-

dence itself and making its own independent findings on this point. See *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469; *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504. Secondly, even if it be assumed that an injury becomes compensable as soon as the employee's general earning capacity is impaired, notwithstanding that his employer continues to pay him the same wages, it does not follow that the period of limitations begins to run at that time, in the absence of proof that the employee knew or had reason to know that he had a right to file a claim for compensation because of such impairment. Section 8(h) provides that in case of a partial disability, like those involved here, the "wage-earning capacity of an injured employee * * * shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity * * *." Only the Deputy Commissioner, and not the injured employee, can make a finding whether the actual wages paid are fairly and reasonably representative of wage-earning capacity. Accordingly, an employee could reasonably and in good faith rely upon the language of Section 8(h) in believing that his wage-earning capacity is not impaired unless and until his wages are actually reduced. As a practical matter, the only way in which an employee in a situation like this would normally know that his "wage-earning capacity" had been

impaired even though his wages remained the same would be if the employer were explicitly to advise him to that effect. In none of the present cases did the employer either allege or offer to prove that the injured employee knew or had reason to know that his "earning capacity" was less than the wages he was actually receiving, and that consequently he was entitled to file a claim for compensation. In these circumstances, it was error to hold, as the district court did, that the employees were barred by the one-year period of limitations. Cf. *Great American Indemnity Co.* v. *Britton*, 179 F. 2d 60 (C. A. D. C.).

Finally, even if, in fact, the claimants' earning capacity had been impaired from the dates of injury so as to have entitled them to compensation, the cases should have been remanded to the Deputy Commissioners for findings as to whether or not in these particular cases the full wages paid to the claimants constituted, in part, gratuities or voluntary payments of compensation which would fall within the exception of Section 13(a) that "if payment of compensation has been made without an award * * * a claim may be filed within one year after the date of the last payment."

The court below upheld the district court's judgments but did not review the grounds on which the district court decided the cases (JR. 46; CR. 72; SR. 44; MR. 58). To the extent that respondents may rely upon the district court's holding as

an independent ground for affirmance, we respectfully submit that for the above-stated reasons it was erroneous.

4. The question here presented is one of substantial importance in the administration of the Longshoremen's Act.[8] If the time for filing claims begins, as the court below held, from the accident rather than the injury, it will be necessary for each employee who meets with an accident whether or not he suffers injury, or disability, or loss of pay, to file a claim for compensation as a matter of self-protection although he may be fully cognizant that he had no right to receive compensation and that his claim must be rejected. This interpretation of the Act will not be readily understood by those whom the Act seeks to protect, and thus operate to their detriment. In particular, a disabled workman who has been paid full wages regularly will not readily regard himself as entitled to compensation in addition to full wages. And an unscrupulous employer may lull an employee into allowing the short limitations period to run by paying full wages for a year and then dismissing him. Cf. *Twin Harbor Stevedoring & Tug Co.* v. *Marshall*, 103 F. 2d 513, 516 (C.A. 9).

The interpretation of the court below is also one which would impair effective administration.

[8] The provisions of the Act have been extended to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, and to other areas by the Defense Bases Act of August 16, 1941, 55 Stat. 622, 42 U.S.C. 1651.

Thus, in the San Francisco Compensation District (under the Longshoremen's Act) alone, some 27,000 injuries were reported under the Act in 1946 (the last year in which detailed figures were reported) or 74 for each calendar day, in which the disability was 7 days or less. If claims must be filed in all such cases to avoid the period of limitations, it would be necessary for the Deputy Commissioner, pursuant to the requirements of Section 19 of the Act (33 U.S.C. 919), upon receipt of each claim, to give notice thereof to the employer and compensation carrier, to investigate, to hold hearings and to adjudicate each claim. It is doubtful that the Deputy Commissioner could perform these statutory functions and do justice to the claims actually compensable under the Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writs of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST, 1951.

APPENDIX

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act (c. 509, 44 Stat. 1424, 33 U. S. C., Secs. 901 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

* * * * *

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death

of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

* * * * *

SEC. 4. (b) Compensation shall be payable irrespective of fault as a cause for the injury.

* * * * *

SEC. 6. (a) No compensation shall be allowed for the first seven days of the disability, except the benefits provide for in section 7: *Provided, however,* That in case the injury results in disability of more than forty-nine days, the compensation shall be allowed from the date of the disability.

* * * * *

SEC. 7. (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require. * * *

* * * * *

SEC. 13. (a) The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except

that if payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

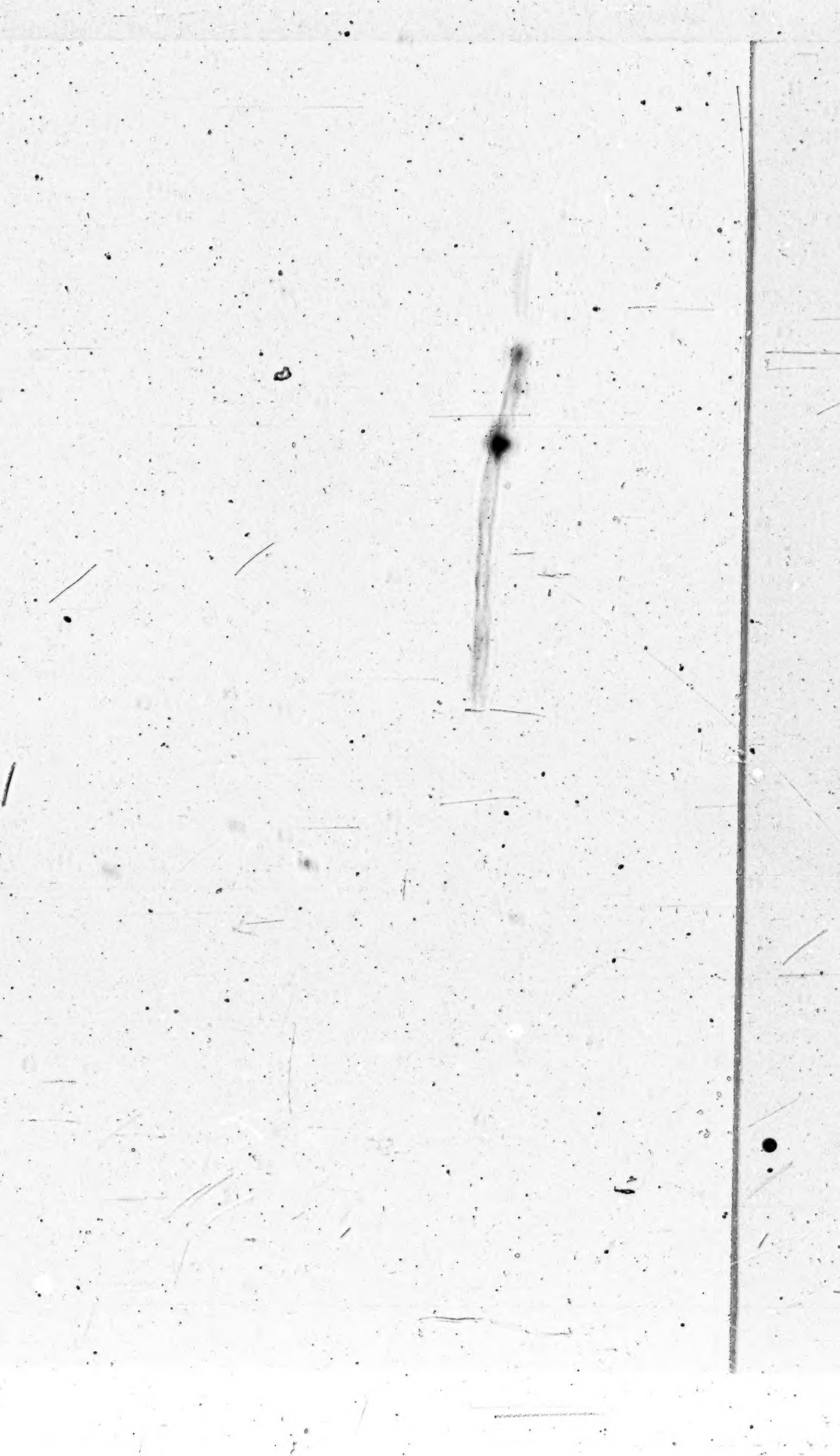
* * * * *

SEC. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Administrator at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * *

SEC. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in



the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

* * * * *

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18.

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